No. 10938

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

THE FRANKLIN FIRE INSURANCE CO. OF PHILADELPHIA, PENNSYLVANIA, a corporation,
Appellant,

vs.

OLUF B. HANNEY, HANS MIKELSEN and PAUL VOHL,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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QUESTION PRESENTED

The brief for the plaintiffs urges that this appeal raises the same question considered and decided upon the former appeal.

On the former appeal the question raised was whether the first count of the plaintiffs' amended complaint (which incorporated the Builders' Risk Policy) stated a cause of action or claim upon which relief could be granted as against motion to dismiss.

On this appeal the question raised is whether, considering the plaintiffs' amended complaint (which incorporated the policy), the defendant's second amend-

ed answer, the depositions, and the plaintiffs' admissions on file when the motion for summary judgment was determined, there was no genuine issue as to any material fact (except only as to the amount of damages).

On the former appeal the defendant contended that the provisions of the policy—considered alone—plainly disclosed the purpose to limit the insurance to materials assembled in or intended for the vessel against risks in, of and about the facilities at Tacoma used for the building thereof at the time and place of the work. In short, the defendant then contended that the policy was itself unambiguous in negativing coverage of materials in Seattle.

On this appeal the defendant contends that the policy—considered with and explained by the agreement for building Hull No. 20—plainly discloses a purpose to limit the insurance to materials at Tacoma assembled in or destined for the construction of the vessel. In other words, the defendant now contends that the policy, aided interpretively by the building contract, is unambiguous in negativing coverage of materials in Seattle never intended for the vessel construction.

The question on the former appeal arose under F. R.C.P. Rule 12; the question on this appeal arises under F.R.C.P. Rule 56. The question on the former appeal was necessarily based upon the policy alone; the question on this appeal is necessarily based upon the policy, upon the building contract, and upon the plaintiffs' admissions relative to both.

The contention of the defendant on the former ap-

peal emphasized the locality of the materials destroyed as not being in Tacoma but in Seattle. The contention of the defendant on this appeal emphasizes the use of the materials destroyed as not being for the construction of Hull No. 20 but for its operation after completion.

The only similarity between the former appeal and the present appeal is that in each the defendant maintains that the plaintiffs have failed to show as a matter of law on the record that they are entitled to recovery upon the Builders' Risk policy in suit.

NO FACTUAL ISSUE

The brief of the plaintiffs (p. 13) says that the main question to be settled presently is whether, when the defendant's motion for summary judgment was submitted, there was any genuine issue of material fact appearing of record from the first count of the amended complaint, the denials of the second amended answer, the admissions of the plaintiffs under Rule 36 and the two depositions. The brief for the plaintiffs (p. 13) asserts that judicial ruling upon such a motion is a matter of search for the existence of an issue, not search for the determination of an issue. So far the defendant agrees.

However, as analyzed by the defendant's opening brief, the record at the time the motion for summary judgment was considered in the District Court shows the existence of no genuine issue of material fact within Rule 56(c). And the arguments of the plaintiffs' answering brief fail to uncover the presence of

any such factual issue on the record as then composed.

To the principal "question to be determined" as conceded by the plaintiffs' brief (p. 13), it devotes scant discussion and small space (pp. 16-19).

The plaintiffs' brief merely observes that the amended complaint alleged and the second amended answer denied "that there is due and owing to the plaintiffs from the defendant the sum of $14,160.14" (p. 17). This observation is not followed by comment that thus was created any such factual issue as to excuse the lower court's refusal of summary judgment to the defendant. And that conclusion could not be soundly advanced against the clause in Rule 56(c) which expressly authorizes a summary judgment if there is no genuine issue of fact "except as to the amount of damages."

Again the plaintiffs' brief simply notes that the amended complaint alleged and the second amended answer denied "that the property (consumed by fire) listed and described by Exhibit B was covered in whole or in part by the insurance policy of which Exhibit A is a copy" (p. 17). But nothing is added to show that thus was joined a "genuine issue" of "material fact" such as to warrant the lower court's withholding from the defendant the summary judgment sought. Of course the reason is that in essence the allegation was a bald legal proposition. Actually the allegation was pure surplusage in the amended complaint, which (apart from jurisdictional elements) needed to set up only the ownership, description, location, purpose and value of the property and the

issuance for consideration of the policy incorporated thereby. Differently characterized, the plaintiffs' allegation was a misplaced prayer for a final, favorable judicial conclusion—the plaintiffs' ultimate contention. If the defendant's denial of such an allegation is to be held to justify the lower court's denial of summary judgment, such a ruling must be based upon this Court's denial of much meaning in the purposeful expression "genuine issue" of "material fact," used in Rule 56(c).

Further the plaintiffs' brief (p. 17) inserts between quotations of allegations in the amended complaint and of denials in the second amended answer, citations of Rule 8 and Forms 1 to 12 F.R.C.P. For what useful purpose does not appear, since neither Rule 8 nor Forms 1 to 12 support plaintiffs' contention that such allegations, coupled with such denials, raised any genuine issue of any material fact.

"The books" overflow with authority supporting the defendant's contention that its denial of the plaintiffs' allegation that the property lost by fire "was covered" by the policy incorporated by the amended complaint raised no factual issue because the allegation was a conclusion of law. A few citations should suffice.

> "Generally allegations as to the construction and effect of a contract * * * are held to be conclusions of law."
>
> 49 C.J. 53, 54.
>
> "No issue of fact is raised by a denial of a mere conclusion of law arising from the pleaded facts."
>
> 49 C.J. 783.
>
> "The contract being set out, it must speak for

itself, and the demurrer does not admit the pleader's legal conclusions concerning it. The court must construe its effect independently of the pleader's interpretation of it."

Lawson v. Sprague, 51 Wash. 286, 290; 98 Pac. 737.

In the pleading "all the facts are set forth, so that the conclusion of the pleader is unimportant."

In re Marron Mfg. Co., 1 F.(2d) 903, (C.C. A. 7).

"The statement as to the understanding of the parties as to the meaning of language used in the written instruments, unaccompanied by an allegation as to what was said or done in that connection, discloses the mere opinion or conclusion of the pleader."

U. S. Shipping Board, etc. Corp. v. Galveston, etc. Co., 13 (F.(2d) 607, 610 (C. C.A. 5).

From the opinion by Mr. Justice Brandeis in a case where a petition was dismissed upon a demurrer, it appears that the petition pleaded the text of a contract involved, including section 3 thereof. Concerning the pleader's conclusions by way of interpretation of the contract, the opinion for the Supreme Court said:

"The petition alleges, among other things, 'that section 3 thereof does not contain and was not intended to contain any receipt or acknowledgment of any consideration by or in favor of the plaintiff for the use of said railroad property during said six months from January 1 to July 1, 1918;' that the section refers only to other provisions; and that the 'plaintiff gained nothing

by the execution of this contract, and by it no rights were lost.' The contention is that these allegations are admitted by the demurrer; and that for this and other reasons section 3 cannot properly be construed to apply to claims of the character of those sought to be recovered, because these 'did not arise out of the contract, or because of anything contained in it.' The allegations in the petition as to the meaning, application, and effect of section 3, being conclusions of law, are not admitted by the demurrer. *United States v. Ames*, 99 U.S. 35, 45, 25 L. ed. 295, 300; *Chicot County v. Sherwood*, 148 U.S. 529, 536, 37 L. ed. 546, 549, 13 Sup. Ct. Rep. 695; *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 43, 53 L. ed. 682, 689, 29 Sup. Ct. Rep. 404. The legal effect of the instrument remains that which its language imports."

St. Louis, Kennett, etc. Co. v. U. S. A., 267 U. S. 346, 69 L. ed. 649, 650.

In concluding discussion upon the primary question of whether the record contained a genuine factual issue, plaintiffs' brief says that "under similar circumstances" (p. 17) this Court reversed a trial court for granting a summary judgment in *State of Washington v. Maricopa County*, 143 F.(2d) 871 (C.C. A. 9).

A review of this Court's opinion in that case shows no "similar circumstances" in the record except that a motion for summary judgment was involved. Very dissimilar circumstances were present in the former litigation, where the motion was based and resisted on contradictory affidavits, and the answer to the complaint contained affirmative allegations deemed to

be denied without reply. On such a contrasting record this Court found a factual issue, and hence, held the motion for summary judgment should have been denied.

However, the opinion of this Court in the case cited by plaintiffs' brief extends aid to the defendant's contention that in the search for a genuine issue of material fact conclusions of law are not controlling, by the observation that they "should have been disregarded." *State of Washington v. Maricopa County*, 143 F.(2d) 871, 872 (C.C.A. 9).

While the plaintiffs' brief (pp. 18, 19) cites additional decisions from other Circuits, it fails to show that they are any more parallel or applicable than the ruling of this Circuit just discussed.

Without more, the plaintiffs' brief (pp. 16-19) concludes argument to support their contention that the record presented a bona fide factual issue. In this portion of the brief they omit to mention that by its second amended answer the defendant denied:

> "(in harmony with admissions made and filed in behalf of the plaintiffs herein) * * * that the property listed and described by Exhibit B was in whole or in part property stored by the plaintiffs for the purpose of being attached to or used upon Halibut Boat Hull No. 20 in the building or construction thereof, or was property belonging to or destined for the building or construction of Halibut Boat Hull No. 20." (R. 38)

But without argument to combat, the defendant reiterates that this "denial" is in truth and in law no real denial because it was a mere summary of the

binding admissions of record made by the plaintiffs in their response (R. 26-37) under Rule 36, whereby, in effect, the corresponding allegations of their amended complaint had been retracted. And it is fairly inconceivable that from this "denial" could this Court find a genuine issue of material fact when the plaintiffs' brief (p. 25) on the present appeal concedes that *none of the property lost "was intended to be used in the construction of the Hull."* In other words, this "denial" by the defendant not only raised no issue of fact below but it creates no issue of contention here.

The defendant's opening brief (p. 11) has already stated that it is not resting the weight of its position upon the two depositions of Wheelock and Stakset. The Stakset deposition (R. 43-89) was concerned solely with values—the amount of plaintiffs' loss or damages; and hence it is quite extraneous to the inquiry under Rule 56(c). The Wheelock discovery deposition (R. 89-119), taken at the instance of the plaintiffs, is relevant to the inquiry and wholly favorable to the defendant as to the insurance afforded to the builder of Hull No. 20 and the plaintiffs by the policy in suit. But as of the time when the lower court ruled upon the motion for summary judgment the testimony in the deposition was nowhere disputed.

There were no other depositions.

No affidavits were ever filed for or against the application for summary judgment.

Then where was the genuine issue of material fact? The plaintiffs' brief has failed to find one. The defendant submits there is none.

NO INSURANCE COVERAGE

To escape from the interpretive light cast upon the insurance policy by the construction agreement the plaintiffs' brief asserts that the record fails to show that either instrument made direct or express reference to the other. Based on this assertion the brief of plaintiffs (pp. 19-24) advances argument and cites cases to the effect that the two documents were not parts of one contract or of one transaction. However, the assertion is contradicted by the record, and hence, the cases cited are inapplicable.

The contract to build Hull No. 20 contained a clause by which it was "*agreed that first party shall procure Builders' Risk insurance the premium for which second party shall also pay.*" (R. 33)

The Builders' Risk policy insuring Hull No. 20 contained a clause under which the plaintiffs' right to recover and the defendant's obligation to pay were both to be calculated or measured by reference to the "completed contract price"; the clause provided that: "*In the event of loss the underwriters shall not be liable for a greater proportion thereof than the amount of this insurance bears to the completed contract price.*" (R. 22).

In other words, by the express terms of the two instruments the contract would have been breached without the issuance of the subsequent policy; and the amount of the recoverable loss and indemnity under the policy could not be determined without resort to the prior contract.

The plaintiffs' brief says the two documents were not parts of a single transaction. On the contrary,

from the two quoted provisions alone, it seems to the defendant that they were interlocking elements of the same transaction. And of this relationship the defendant's opening brief (pp. 15-18) has already extracted from the record further proof:

(1) The parties to the contract were "Peter Petersen of Brown's Point, Tacoma, Washington, doing business as Marine View Boat Building Co." and "Oluf B. Hanney." (R.30) The assureds named in the policy were "Peter Petersen d/b/a Marine View Boat Building Co., builder, and Oluf B. Hanney, owner" (R. 17, 21, 22).

(2) The building contract described its subject matter as follows: "The vessel herein contemplated shall be known and designated as Hull No. 20 during its construction." (R. 32) The Builders' Risk policy identified the subject of its insurance as follows: "Hull No. 20 (Being Built)" and "Hull No. 20, building at Brown's Point, Tacoma, Washington." (R. 18, 22)

(3) "Hull No. 20" as referred to by the contract and as referred to in the policy was the same. (R. 29, 36, 37—the defendant's "Request for Admissions under Rule 36," Item (2)-f; the plaintiffs' answer (2)-f "Response to Request for Admissions under Rule 36").

Further to summarize from the text of the two documents and the admissions of the plaintiffs, the record shows:

(1) That the parties to the contract and the named assureds in the policy were the same;

(2) That "Hull No. 20" to be built and "Hull No. 20" to be insured were identical;

(3) That the contract required the issuance of the

policy; and settlement under the policy necessitated a resort to the contract.

For these reasons the defendant repeats that the two instruments were interdependent parts of a single transaction. As so connected the applicable rules of interpretation not only permit but insist that the policy, if itself alone ambiguous, be clarified by the explanation contained in the contract.

> "A writing is interpreted as a whole, and all writings forming part of the same transaction are interpreted together."
>
> Sec. 235(c), p. 319, "Rules Aiding Application of Standards of Interpretation"—Restatement of the Law of Contracts by American Law Institute.
>
> "The principle that the instrument shall be considered as a whole applies when a transaction is incorporated in or evidenced by more than one writing, in which case all the writings are treated as if they were parts of one instrument and are considered together for the purpose of determining the meaning of the parties."
>
> 17 Am. & Eng. Ency. of Law (2d), p. 9.
>
> "Where a writing refers to another document, that other document, or so much of it as is referred to in it, is to be construed as a part of the writing. * * * It is usually said that the two writings together form one contract."
>
> 2 Williston on Contracts, Sec. 628, p. 1211.
>
> "Writings which are made a part of a contract by annexation or reference will be so construed. * * * Reference is sufficient without actual annexation."
>
> 13 C.J. Sec. 488, p. 530.
>
> "Where a writing itself contains a reference

to extrinsic matters, these matters may be shown for the purpose of explaining the writing."

32 C.J.S., Sec. 960, p. 902.

"Matters contained in other writings which are referred to may be regarded as a part of the contract and may, therefore, properly be considered in the interpretation of the contract. * * * Several instruments constituting part of the same transaction must be interpreted together."

12 Am. Jurisprudence p. 781, Secs. 245, 246.

"In determining the matter of the intention of the parties, plaintiffs propose that the court examine their application for the policy in suit. Defendants argue that inasmuch as the application is not made a part of the contract, it has no bearing and should not be considered. Among the cases cited to sustain plaintiffs' theory is that of *Employers' Liability Assuance Corp. v. Wasson*, 8 Cir., 75 F. 2d 749. So far as the opinion in that case discloses, the application was not made a part of the bond, but was considered by the court in ascertaining the intention of the parties to the insurance contract. From a reading of the cases cited by defendants, we do not believe there is any rule which precludes a court from an examination and consideration of the application for the purpose of determining the intention of the parties and this, irrespective of whether or not the application is a part of the contract."

Paddleford v. Fidelity & Casualty Co., 100 F.(2d) 606, 611 (C.C.A. 7).

"It is elementary that the acceptance of the offer gave rise to an agreement, evidenced by the written application. It was perfectly competent

> for the parties to make, as they did, the schedules of the company a part of the contract *by mere reference* to them. These documents were readily subject to identification, and there is no dispute here concerning either their existence or their terms. *Benson v. Metropolitan Life Insurance Co.*, 126 Wash. 125, 217 P. 709; *Green v. National Casualty Co.*, 87 Wash. 237, 151 P. 509; *Friedman v. Metropolitan Life Insurance Co.*, 250 App. Div. 195, 293 N.Y.S. 757." (Italics supplied)
>
> *Metropolitan Life Ins. Co. v. Henderson*, 92 F.(2d) 891, 894 (C.C.A. 9).

In the Ninth Circuit opinion just quoted this Court cited a case entitled *Green v. National Casualty Co.*, 87 Wash. 237, 151 P. 509, involving an accident insurance policy, in the application for which some reference was made to the company's manual of hazardous occupations. The Washington Supreme Court held the manual should be examined to amplify and explain the policy, adopting from 9 Cyc. 582 language as follows:

> "Where one paper refers to another for its terms, it is the same as though the words of the one referred to were inserted in the former."
>
> *Green v. National Casualty Co.*, 87 Wash. 237, 245, 151 P. 509.

The other Washington case cited by this Court in *Metropolitan Life Insurance Co. v. Henderson, supra*, gave effect to the principle that mere reference in an application for a contract to a schedule is sufficient to make it operative therein—*Benson v. Metropolitan Life Insurance Co.*, 126 Wash. 125, 217 P. 709.

In a further Washington case an owner of real

estate entered into an agreement to pay commission to a realtor "under the terms and conditions" of an earnest money receipt signed by both owner and purchaser, which was later cancelled. On a suit by the realtor for commission it was held:

> "The contract sued on, since it refers to the other, is to be construed as if that other to that extent was incorporated in it, and the cancellation of the other, being between entirely different parties, in no way depreciates its value."
>
> *Lemcke & Co. v. Nordby*, 117 Wash. 221, 223, 200 Pac. 1103.

The plaintiffs' brief (pp. 20-23) cites a number of decisions from Washington and other jurisdictions to sustain the legal proposition that a document or paper not mentioned by a contract does not become a part thereof. Since the Builders' Risk policy insuring Hull No. 20 expressly refers to the builder's contract the plaintiffs' proposition is inapplicable and most of such citations are inapplicable. This is definitely true as to the recent ruling of the Washington Supreme Court upon which plaintiffs seem especially to rely—*Laughlin v. March*, 19 Wn.(2d) 874, 145 P.(2d) 549, for the reason that the Court was there dealing with real property upon which it was sought to impose an express trust by oral testimony to connect a defective, formal, notarized declaration with an unsigned, unidentified scrap of paper not mentioned by the declaration itself.

It being established in fact and in law that the agreement to construct "Hull No. 20" and the policy to insure "Hull No. 20" were parts of the same transaction so that ambiguity in the latter should be explained by resort to the former, it becomes apparent

that the defendant was insuring Petersen as builder and Hanney, one of the plaintiffs, as owner of Hull No. 20 respecting materials, etc., at Tacoma, to the extent assembled in and destined for the *construction* of that contemplated vessel.

When the two documents are read together it becomes patent that the term "Hull No. 20" was accepted in the contract as the designation of all the property necessary to the construction of the contemplated vessel "to be complete in all respects," which was therein further particularly defined; and that the term "Hull No. 20" was adopted in the later policy to describe the same property for insurance coverage.

Examination of the two instruments also makes it clear that not only did they identify their common subject matter by the same arbitrary term of convenience but they valued the construction materials and the insured materials at the same figure—$30,000 was the full purchase price of Hull No. 20 under the contract as completed by the builder, and $30,000 was the final amount of insurance of Hull No. 20 under the policy as completion approached.

To push the plaintiffs into confession of the interdependent relationship between the contract and the policy the defendant made demand for certain admissions as authorized by Rule 36. Under such pressure the plaintiffs admitted:

(a) That full performance of the contract to construct Hull No. 20 as a vessel "complete in all respects" did not require from either party any of the

property lost by fire at Seattle—listed in plaintiffs' Exhibit B (R. 27, 29, 36, 37);

(b) That during the full performance of such contract and in the finished construction of the vessel thereunder there was not used *other similar substitute property*—listed in item "(2)-b" of defendant's Request for Admissions (R. 27, 28, 36).

These admissions were so forced by the defendant from the plaintiffs to disclose the categorical difference in character and purpose between the materials for construction to be supplied and collected at Tacoma by the builder to make Hull No. 20 "complete in all respects" under the contract, and the plaintiffs' paraphernalia, owned and burned at Seattle, to be used in fishing and operating the vessel after completion and delivery thereof. And the admissions having been painfully developed on the record, now plaintiffs' brief (p. 25) concedes the difference between the two classes of property both as to kind and intent by saying:

> "An examination of the list of such gear and equipment (Rec. 23-25; Plaintiffs' Exhibit B) readily discloses that *none of such gear or equipment was intended to be used in the construction of the hull.*"

In the light of this concession it is clear why the brief of plaintiffs labors so heavily to exclude from this Court's interpretive thinking the builder's contract for the construction of Hull No. 20, for it becomes settled that the property destroyed by fire was outside the insurance coverage of the policy, not only because (as contended upon the first appeal) it was

located in Seattle, but also because (as contended upon this appeal) it was no part of the subject matter of the builder's contract and no part of the construction of Hull No. 20 which the builder was obligated to make a vessel "complete in all respects" (R. 32).

To epitomize, the defendant in this appeal stands on the proposition that the Builders' Risk policy as explained by the builder's contract was certain and unambiguous in its objective to insure materials as supplied and assembled at Tacoma for the construction and completion of Hull No. 20, but not to cover also other materials as stored in Seattle for the subsequent operation and fishing with the vessel after delivery.

In the defendant's view of the whole matter Hanney, one of the plaintiffs, wanted a fishing boat. To acquire it at a price of $30,000 he made a contract with Petersen, a builder at Tacoma. By the contract, to protect himself, a performance bond was required; and to protect himself and the builder, an insurance policy was required. The penalty of the bond was set at $30,000. The final amount of insurance was fixed at $30,000. Hanney and his associate plaintiffs picked up some secondhand nets, gear, etc. for $4000 (R. 46) at Seattle to use in fishing after the builder had finished the job and delivered the boat. A Seattle dock fire destroyed the fishing equipment. Claiming the property to be worth $14,160.14 (R. 5) the plaintiffs have been in effect trying to obtain through this litigation the benefit of $44,160.14 of insurance from the defendant, whose premium was calculated and paid upon a maximum risk of $30,000.

With knowledge of this history, it is less than surprising that in this suit the defendant has sought to avoid a jury verdict dependent upon testimony from such plaintiffs, and still seeks to obtain a court decision interpreting its policy as a matter of law.

Before the first appeal the District Court held that the policy by itself, alone, negatived liability as a matter of law. On the first appeal this Court held the policy, unexplained, was obscure. After the first appeal the District Court in ruling upon the motion for summary judgment doubtless felt constrained to hold a trial in deference to this Court's possible desire that a second appeal conclude the litigation in any event. However, on the present appeal this Court will be under no like embarrassment. Hence, the defendant urges that the Builders' Risk policy as explained by the builder's contract be searchingly scrutinized, since it is the defendant's conviction that as interpreted together the policy and the contract show as a matter of law that the defendant is not liable.

Of course the plaintiffs' brief protests that if summary judgment be granted on the defendant's motion the result will have deprived the plaintiffs of their right to a jury trial. In reply the defendant merely cites the text of Rule 56, which, in effect, declares that the plaintiffs have no such right, since the record presented no genuine issue of material fact when the motion was submitted, and the trial court then was and this Court now is faced with an unadulterated question of law, since the Builders' Risk policy as supplemented by the builder's contract was unambiguous

in negativing the insurance coverage asserted against it. Therefore, the District Court should be reversed.

Respectfully submitted,

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